SARAWAK SHELL BHD & ORS A

v.

CHONG THIAN FOOK & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NOS: Q-02-1075-2004 &
Q-02-1177-2004] C
23 MARCH 2007

LABOUR LAW: *Provident Fund - Contributions - Allegations of unlawful deductions by plaintiffs - Unjust enrichment and breach of trust - Interpretation of regulations of fund - Whether plaintiffs entitled to full reimbursement and restitution - Employees Provident Fund Act 1951, s. 9(1) - Employees Provident Fund Act 1991, s. 47(1) - Rules of the High Court 1980, O. 14A* D

PROVIDENT FUND: *Arrears of contributions - Failure to pay - Allegations of unlawful deductions by plaintiffs - Unjust enrichment and breach of trust - Interpretation of regulations of fund - Whether plaintiffs entitled to full reimbursement and restitution - Employees Provident Fund Act 1951, s. 9(1) - Employees Provident Fund Act 1991, s. 47(1) - Rules of the High Court 1980, O. 14A* E F

The plaintiffs in this appeal were 399 former employees of either the first or the second defendant company. All of them were, as employees of the companies, members of the Shell Sarawak and Sabah Retirement Benefit Fund ('RBF'), and 57 of them were also members of the Shell Sabah and Sarawak Provident Fund ('PF'). G Both the RBF and the PF were trust funds established by the companies, and the plaintiffs' action concerned their entitlement under the RBF. The RBF was not a contributory fund, that is to say, the employee members did not contribute to the fund. The moneys in the fund were derived from contributions by the H member companies and from other sources. The plaintiffs were also members of the Employees Provident Fund ('EPF'), which was established under the EPF Act 1951, which in turn was repealed and replaced by the EPF Act 1991. The plaintiffs' grievance was stimulated by their reading of certain provisions of the regulations I relating to the RBF, namely, parts of regs. 5, 7 and 8. They averred that when they severally received their RBF entitlement

from the first or second defendant company, they discovered that from their entitlement there had been made deductions of their employers' contributions to the EPF and the PF, and of interests or dividends declared on those contributions. They contended that the deductions were in contravention of law, "particularly" the EPF Acts of 1951 and 1991. The provisions of the EPF Acts that they said were contravened were s. 9(1) of the 1951 Act and s. 47(1) of the 1991 Act. The defendants denied the alleged deductions. Their case was that by virtue of reg. 5(2), the benefit due to a member from the RBF was a lump sum sufficient to bring the aggregate of the EPF and PF contributions and the interest on them up to the appropriate level specified in reg. 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of the lump sum did not involve any deduction whatsoever. The defendants' case, therefore, did not involve reg. 7(1)(c) at all. Pursuant to the defendants' application under O. 14A of the Rules of the High Court 1980 for the determination of questions and issues of law, the learned judge (Judicial Commissioner) found, *inter alia*, that the plaintiffs were entitled to a full reimbursement and restitution of their total RBF and PF entitlements. From that arose the defendants' Appeal No. 1075. The learned judge also held that there was no unjust enrichment and no breach of trust, resulting in the plaintiffs' Appeal No. 1177.

Held (allowing Appeal No. 1075 and dismissing Appeal No. 1177)

Per Abdul Aziz Mohamad JCA delivering the judgment of the court:

(1) The serious error in this case was the judge's view, the plaintiff's counsel's contention and the belief that the plaintiffs held or were led to hold, that the lump sum that constituted the benefit due from the RBF was the level of benefit. The judge's formula, with a commonly accepted amendment, was that the net benefit due from the RBF was (A+B+C)-D, where A and B were the amounts under reg. 5(2) – the "accrued benefits" – C was the level of benefit, and D was an authorized deduction or deductions under reg. 7. In his oral submission, the plaintiff's counsel said, as recorded: "Our submission is that the lump sum is (a+b) plus the 3rd sum if necessary to bring (a+b) to level of benefit. The lump sum is the aggregate sum of (a)+(b)+top-up and not just the top-up".

Since that aggregate must, of arithmetical necessity, be equal to the level of benefit, the submission amounted to an assertion that the lump sum must be the level of benefit. That was patently wrong. The error arose from a failure or refusal to appreciate or recognize the true significance of the words "sufficient to bring the aggregate of [the accrued benefits] up to the level of benefit specified in sub-clause (3)" in reg. 5(2) that qualify or describe what the lump sum was that constituted the benefit due to a member from the fund. (para 23)

(2) It was because they held the notion that the RBF benefit that they were entitled to was the level of benefit, which was a wrong notion, that the plaintiffs became aggrieved when they discovered upon receiving their RBF benefit that the trustees had deducted the accrued benefits, particularly the EPF contributions, from their respective levels of benefit. They would not recognize that the deduction was made in the arithmetical implementation of sub-cl. (2) of reg. 5 in order to arrive at the sufficient lump sum, because that would be the legal answer to their grievance that would make it legally baseless. Instead they turned to para. (c) of reg. 7(1) and contended that the deduction was made under that paragraph. From that paragraph their counsel, in this appeal, chose the words "any payments which a Company shall by law … have been required to make to the Member … by way of additional remuneration" and argued that the employer's EPF contributions fitted into those words and then, turning to the two sections of the EPF Acts, further argued that the amount of the level of benefit which the plaintiffs contended was the benefit due to them under the RBF was "wages of remuneration" and that, therefore, the employer's EPF contributions had been deducted or recovered from their wages or remuneration in contravention of the two sections. (para 24)

(3) In this case, there was only one instance of "deduction" of the EPF and PF benefits and that was an arithmetical or accounting deduction to arrive at the sufficient lump sum, and not a deprivative deduction. There had not been another instance of deduction of those benefits, to be seen as a reg. 7(1)(c) deduction. Since the plaintiffs would not have been driven to construe that regulation in the way that had

A been done in this appeal and in the High Court had they not held the notion that the lump sum was the level of benefit, and since that notion was patently wrong, the defendants' Appeal No. 1075 had to be allowed without the necessity of entering upon a deliberation of the arguments concerning
B reg. 7(1)(c) and the two EPF sections and making a reasoned finding as to the correctness of the High Court's declarations concerning that regulation. It would be a purely academic exercise, and one of a very involved nature, that was not required to be carried out in order to dispose of Appeal No.
C 1075. Those declarations were sought solely to entitle the plaintiffs to a restitution of the alleged deductions. There had been no deductions under or by virtue of para. (c) of reg. 7(1) and the plaintiffs were not entitled to any restitution or, in other words, to succeed in their action. To order restitution,
D as the High Court did, would be to compensate them for what they had not lost but were always available for their enjoyment and benefit. (para 25)

(4) Nevertheless, a few words in general ought to be said about
E para. (c) of reg. 7(1). That paragraph of course did not mention employer's EPF contributions. It was only by resorting to the argumentative faculties and calling in aid various authorities that the plaintiffs sought to establish that "any payments which a Company shall by law ... have been
F required to make to the Member ... by way of additional remuneration or benefit beyond his ordinary remuneration" would or could cover employer's EPF contributions. It was an irresistible reflection that if, before they became aware of the manner in which their RBF entitlement was computed, a
G suggestion had been made that the employer's EPF contributions might be deducted from their RBF entitlement by virtue of para. (c) of reg. 7(1) because the words in question were capable of referring to the employer's EPF contributions, the plaintiffs would have come out strongly against such a
H construal of the words. It could not have been the intention of the member companies who established the RBF and the regulations to deduct employer's EPF contributions from the sufficient lump sum that constituted the benefit payable under the RBF and to resort to para. (c) of reg. 7(1) to enable that
I to be done, and therefore it could not have been their intention that the paragraph be subtly framed using the words in question to achieve that purpose, because to deduct

employer's EPF contributions from the lump sum would not only expose them to accusations of illegal action and fraud on employees but would result in no employee getting any benefit from the RBF and in the RBF becoming a futile exercise, and it was inconceivable that those companies would embark on such an absurd, pointless and perilous undertaking. (para 26)

(5) Since the defendants succeeded completely in Appeal No. 1075, it was not necessary to answer the question whether, even if the defendants should fail in their appeal on the O. 14A questions, the restitutionary orders ought nevertheless to be set aside or suspended pending the trial of the issue of limitation. The question arose because the defendants had in their statements of defence raised the defence of limitation which in the appeal the defendants contended had still to be tried, notwithstanding that the O. 14A questions had been answered in the High Court in favour of the plaintiffs, before the judge could finally decide the action and grant the reliefs sought. (para 27)

(6) Since the prayers in the plaintiff's Appeal No. 1177 were sought on the premise that there had been wrongful deductions from the plaintiffs' RBF entitlement, and since there were no such deductions, Appeal No. 1177 ought to be dismissed. (para 28)

Bahasa Malaysia *translation of headnotes*

Plaintif-plaintif yang seramai 399 orang dalam rayuan ini adalah pekerja syarikat-syarikat defendan pertama dan defendan kedua. Selaku pekerja syarikat-syarikat tersebut, semua mereka adalah ahli kepada Shell Sarawak dan Tabung Faedah Saraan Sabah ('RBF'), sementara 57 orang dari mereka adalah juga ahli kepada Tabung Kewangan Shell Sabah dan Sarawak ('PF'). RBF dan PF adalah tabung amanah yang ditubuhkan oleh syarikat-syarikat. RBF bukanlah tabung sumbangan, kerana pekerja-pekerja tidak menyumbang kepada tabung tersebut. Sebaliknya wang dalam tabung tersebut diperolehi dari sumbangan syarikat-syarikat serta dari sumber-sumber lain. Plaintif-plaintif juga adalah ahli kepada Kumpulan Wang Simpanan Pekerja ('KWSP'), yang ditubuhkan di bawah Akta KWSP 1951, yang kemudian dimansuh dan diganti dengan Akta KWSP 1991. Plaintif-plaintif merasa terkilan apabila membaca beberapa peruntukan tertentu mengenai peraturan-

peraturan RBF, yakni, beberapa bahagian pada peraturan-peraturan 5, 7 dan 8. Menurut plaintif-plaintif, apabila mereka menerima faedah RBF mereka dari syarikat defendan pertama atau kedua, faedah-faedah tersebut sudah dipotong dengan jumlah sumbangan majikan terhadap KWSP dan PF, termasuk faedah atau dividen yang terakru dari sumbangan-sumbangan tersebut. Mereka berhujah bahawa potongan sedemikian adalah bertentangan dengan undang-undang, "terutama" dengan Akta-Akta KWSP 1951 dan 1991. Peruntukan Akta KWSP yang dikatakan telah dilanggar adalah s. 9(1) Akta 1951 dan s. 47(1) Akta 1991. Defendan-defendan menafikan bahawa berlaku potongan seperti yang didakwa. Kes defendan-defendan adalah bahawa, mengambilkira per. 5(2), faedah yang terakru kepada seseorang ahli dari RBF adalah satu jumlah pukal yang mencukupi untuk mengangkat agreget sumbangan EPF dan PF dan faedah-faedahnya ke tahap sewajarnya seperti yang tertera di dalam per. 5(3), yang bermakna jumlah pukal yang mencukupi tersebut adalah perbezaan antara tahap wajar berkenaan dengan agreget yang berkaitan, dan dengan itu pembayaran jumlah pukal tersebut tidak melibatkan apa-apa potongan pun. Ini bererti, kes defendan-defendan langsung tidak melibatkan per. 7(1)(c). Ekoran permohonan defendan-defendan di bawah A. 14A Kaedah-Keadah Mahkamah Tinggi 1980 untuk pemutusan isu-isu dan persoalan undang-undang di sini, yang arif hakim (Pesuruhjaya Kehakiman), antara lain, mendapati bahawa plaintif-plaintif berhak kepada restitusi dan segala faedah-faedah RBF dan PF yang terhak kepada mereka. Ini telah membangkitkan Rayuan No. 1075 oleh defendan-defendan. Yang arif hakim juga memutuskan bahawa tidak wujud pengkayaan tidak wajar ataupun apa-apa pemungkiran amanah, sekaligus mencetuskan rayuan No. 1177 oleh plaintif-plaintif.

Diputuskan (membenarkan rayuan No. 1075 dan menolak rayuan No. 1177)

Oleh Abdul Aziz Mohamad HMR menyampaikan penghakiman mahkamah:

(1) Kesilapan serius dalam kes ini adalah pada pendapat hakim, pada hujah peguam plaintif-plaintif dan pada kepercayaan yang dipegang plaintif-plaintif atau yang mereka terdorong untuk memegang, bahawa jumlah pukal yang merupakan faedah dari RBF adalah bersamaan dengan tahap faedah. Formula hakim, beserta dengan ubahsuai yang diterima semua pihak, adalah bahawa faedah bersih yang terakru dari RBF adalah (A+B+C)-D, di mana A dan B adalah jumlah-jumlah di bawah per. 5(2)

– iaitu "faedah terakru" – C adalah tahap faedah, dan D adalah potongan atau potongan yang dibenarkan di bawah per. 7. Dalam hujah lisannya, peguam plaintif-plaintif menyatakan, seperti yang direkodkan: "Hujah kami adalah bahawa jumlah pukal adalah (a+b) dicampur dengan jumlah ke 3 jika perlu bagi membawa (a+b) ke tahap faedah. Jumlah pukal adalah jumlah agreget (a)+(b)+tambahan dan bukan semata-mata tambahan". Oleh kerana agreget, sebagai satu keperluan ilmu kira-kira, harus menyamai tahap faedah (level of benefit), maka hujah ini samalah seperti mengatakan bahawa jumlah pukal adalah bersamaan tahap faedah. Ini jelas silap. Kesilapan berbangkit dari kegagalan atau keengganan untuk melihat atau mengakui kepentingan sebenar ungkapan "mencukupi untuk membawa agreget [faedah terakru] hingga ke tahap faedah yang dinyatakan di dalam perenggan kecil (3)" di dalam per. 5(2) yang membatasi atau menghurai apakah itu jumlah pukal yang menjadi faedah yang harus dibayar daripada tabung kepada seseorang ahli.

(2) Disebabkan mereka menganggap faedah RBF yang mereka berhak itu adalah tahap faedah, yang mana ia adalah fahaman yang salah, maka plaintif merasa terkilan apabila mendapati, sewaktu menerima faedah RBF mereka, bahawa pemegang-pemegang amanah telah memotong faedah-faedah terakru mereka, terutama sumbangan-sumbangan KWSP, dari tahap faedah mereka masing-masing. Mereka tidak menyedari bahawa potongan-potongan adalah dibuat dengan melaksanakan perkiraan di bawah perenggan kecil (2) per. 5 bagi mencapai jumlah pukal yang mencukupi, disebabkan itu adalah jawapan sebenar undang-undang kepada permasaalahan mereka, sekaligus menjadikan rungutan mereka tidak berasas di sisi undang-undang. Plaintif-plaintif sebaliknya membangkitkan perenggan (c) per. 7(1) dan berhujah bahawa potongan dibuat di bawah perenggan tersebut. Dari perenggan ini, peguam plaintif-plaintif memilih ungkapan "mana-mana bayaran yang Syarikat wajib membayar di bawah undang-undang … adalah dikehendaki menjelaskan kepada Ahli … melalui remunerasi tambahan" dan berhujah bahawa sumbangan KWSP majikan adalah dirangkum oleh ungkapan tersebut. Dihujahkan seterusnya, dengan berdasarkan kepada dua seksyen Akta KWSP, bahawa jumlah tahap faedah yang dikatakan oleh plaintif-plaintif sebagai terhak kepada mereka di bawah RBF

adalah "remunerasi gaji", dan dengan itu sumbangan KWSP majikan telah dipotong atau diambil dengan cara yang menyalahi kedua-dua seksyen tersebut.

(3) Dalam kes ini, terdapat hanya satu sahaja kes "potongan" faedah KWSP dan PF, iaitu potongan yang dibuat secara arithmatik atau akaun bagi mencapai jumlah pukal mencukupi, dan bukannya potongan deprivatif. Tidak terdapat sebarang potongan faedah tersebut yang selain dari ini, yang boleh dianggap sebagai potongan per. 7(1)(c). Oleh kerana plaintif-plaintif tidak akan terdorong untuk mentafsirkan peraturan secara yang dibuat di rayuan ini dan di Mahkamah Tinggi sekiranya mereka tidak berfahaman bahawa jumlah pukal adalah tahap faedah, dan oleh kerana fahaman sedemikian jelas silap, maka Rayuan No. 1075 defendan dibenarkan tanpa perlu mengupas hujah-hujah berkaitan per. 7(1)(c) dan kedua-dua seksyen KWSP, dan tanpa perlu membuat dapatan bersebab mengenai betul atau tidaknya deklarasi Mahkamah Tinggi mengenai peraturan itu. Berbuat demikian, walaupun sesuatu yang akademik, memerlukan penelitian yang mendalam, sedangkan ia adalah tidak perlu bagi melupuskan Rayuan No. 1075. Deklarasi-deklarasi ini dipohon hanya untuk membolehkan plaintif-plaintif mendapat restitusi potongan-potongan yang didakwa. Bagaimanapun, hakikatnya, tidak ada sebarang potongan sama ada di bawah atau melalui perenggan (c) per. 7(1) dan plaintif-plaintif tidak berhak kepada apa-apa restitusi atau, dengan kata lain, apa-apa kejayaan dalam tindakan mereka. Untuk memerintahkan restitusi, seperti yang dibuat oleh Mahkamah Tinggi, akan hanya mempampasi mereka atas sesuatu yang mereka tidak kehilangan dan yang masih tersedia untuk dinikmati oleh mereka.

(4) Apapun, adalah perlu untuk menyentuh sedikit perenggan (c) per. 7(1). Perenggan tersebut sememangnya tidak menyebut sumbangan KWSP majikan. Bagaimanapun, melalui hujah-hujah mereka dan dengan cara mengemukakan autoriti-autoriti yang berkaitan, plaintif-planitf cuba membuktikan bahawa ungkapan "mana-mana bayaran yang Syarikat wajib membayar di bawah undang-undang … adalah dikehendaki menjelaskan kepada Ahli … melalui remunerasi tambahan atau faedah selain dari remunerasi biasa" membolehkan mereka mendapatkan sumbangan KWSP. Tidak boleh dinafikan bahawa sekiranya plaintif-plaintif, sebelum menyedari tentang cara bagaimana

faedah RBF mereka dikira, diajukan dengan pandangan bahawa sumbangan KWSP majikan akan dipotong dari faedah RBF mereka berdasarkan perenggan (c) per. 7(1) kerana ungkapan yang berkenaan boleh ditafsir sebagai merujuk kepada sumbangan KWSP majikan, plaintif-plaintif tentunya akan menentang keras pentafsiran ungkapan tersebut yang sedemikian rupa. Bukanlah menjadi niat syarikat-syarikat ahli yang menubuhkan RBF dan peraturan-peraturan untuk memotong sumbangan KWSP majikan dari jumlah pukal mencukupi, yang merupakan faedah yang harus dibayar di bawah RBF, atau menggunapakai perenggan (c) per. 7(1) untuk maksud itu, dan oleh kerana itu, bukanlah niat mereka untuk mengolah perenggan tersebut secara halus dengan menggunakan perkataan-perkataan berkenaan bagi mencapai maksud tersebut, kerana, bukan sahaja perbuatan memotong sumbangan KWSP majikan dari jumlah pukal mencukupi akan mendedahkan mereka kepada tuduhan tindakan salah dan fraud terhadap pekerja-pekerja, tetapi akan menyebabkan tiada seorang pun pekerja yang akan mendapat faedah dari RBF sekaligus menjadikan RBF sesuatu yang sia-sia. Sukar dipercayai bahawa syarikat-syarikat akan melibatkan diri dalam usaha yang sebegitu bodoh, tak berguna dan berbahaya.

(5) Oleh kerana defendan-defendan berjaya sepenuhnya dalam Rayuan No. 1075, adalah tidak perlu untuk menjawab soalan sama ada, jika mereka gagal dalam rayuan atas persoalan-persoalan A. 14A, perintah-perintah restitusi seharusnya juga diketepikan atau digantung sementara menunggu perbicaraan mengenai isu penghadan. Soalan ini berbangkit kerana defendan-defendan, dalam penyata pembelaan mereka, membangkitkan pembelaan penghadan yang di dalam rayuan ini dikatakan masih perlu dibicarakan, walaupun persoalan-persoalan A. 14A telah dijawab oleh Mahkamah Tinggi secara yang berpihak kepada plaintif-plaintif, sebelum hakim memutuskan tindakan secara muktamad dan membenarkan relif yang dipohon.

(6) Oleh kerana permohonan-permohonan di dalam Rayuan No. 1177 plaintif-plaintif dipohon atas dasar bahawa terdapat potongan yang salah terhadap faedah RBF mereka, dan oleh kerana potongan salah sedemikan tidak wujud, maka Rayuan No. 1177 harus ditolak.

Legislation referred to:
Employees Provident Fund Act 1951, s. 9(1)
Employees Provident Fund Act 1991, s. 47(1)
Rules of the High Court 1980, O. 14A

(Civil Appeal No: Q-02-1075-2004)
For the appellants - Robert Ham QC (Cecil Abraham, Jimmy Wee & Shanti Mogan with him); M/s Jimmy HT Wee & Co
For the respondents - Cyrus Das (Eric CS Khoo, Steven Thiruneelakandan, Gabriel CH Kok & David Mathew with him); M/s Khoo & Co

(Civil Appeal No: Q-02-1177-2004)
For the appellants - Cyrus Das (Eric CS Khoo, Steven Thiruneelakandan, Gabriel CH Kok & David Mathew with him); M/s Khoo & Co
For the respondents - Robert Ham QC (Cecil Abraham, Jimmy Wee & Shanti Mogan with him); M/s Jimmy HT Wee & Co

[Appeal from High Court Miri; Civil Suit No: 22-69-2002 (MR)]

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad JCA:

[1] The parties in these two appeals will be referred to as the plaintiffs and defendants. These two appeals arose from orders made by the High Court at Miri on 20 September 2004 in an action brought by the plaintiffs. The plaintiffs are 399 former employees of either the first or the second defendant company. All of them were, as employees of the companies, members of the Shell Sarawak and Sabah Retirement Benefit Fund ("the RBF"). 57 of them were also members of the Shell Sabah and Sarawak Provident Fund ("the PF"). Both the RBF and the PF are trust funds established by the companies. The PF was established in March 1968 as a fund to which members made or could make contributions and the employer company had to make contributions in respect of each contributing member. The plaintiffs' action concerned their entitlement under the RBF, which was established with effect from 1 January 1976 by a Trust Deed made on 6 December 1976 by the "Member Companies", namely, the two defendant companies and several other Shell companies, who desired to establish the RBF "for the benefit of those of their employees whose domicile is in Sarawak or Sabah or (being domiciled outside Malaysia) are employed in Sarawak or Sabah".

The RBF is not a contributory fund, that is to say, the employee members do not contribute to the fund. The moneys in the fund are derived from contributions by the Member Companies and from other sources. Besides the Trust Deed, the fund is subject to the regulations annexed to it. The affairs of the RBF are managed by the trustees of the fund. The plaintiffs' action was also, besides the two defendant companies, against the trustees, seven of them originally, but subsequently the number was reduced to four. The plaintiffs were also members of the Employees Provident Fund ("the EPF"), which was established under the Employees Provident Fund Act 1951, which in turn was repealed and replaced by the Employees Provident Fund Act 1991. The Acts required the plaintiffs to contribute to the EPF and the two defendant companies to make employer's contributions to it in respect of the plaintiffs.

[2] The plaintiffs' grievance was stimulated by their reading of certain provisions of the aforementioned regulations relating to the RBF, namely, parts of regs. 5, 7 and 8. Of reg. 5, it is necessary to look only at sub-clauses (1), (2) and 3(a)(b):

> 5(1) When a Member leaves Company Service (other than a Member who dies in Company Service) the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 or because of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the Employing Company determine otherwise).
>
> (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:
>
> (a) so much of a Member's balance at the time he leaves Company Service as amounts to contributions made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon in
>
> (i) the Local Provident Fund, and
>
> (ii) the State Fund, and

A

(iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and

(b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is included in his Accredited Service,

B

up to the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7.

C

(3)(a) The level of benefit applicable to a Member who

(i) has reached age 55, or

(ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

D

(iii) has left Company Service because of chronic disability,

shall be either the aggregate of 2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990,

E

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991,

2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991, and

F

2.2. x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

OR

G

2.25 x Relevant Earnings x years of Accredited Service;

whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings.

H

[3] Of reg. 7, it is necessary to look only at sub-clause (1) and, of the four paragraphs of amounts under it, to look only at para. (c):

I

7(1) The Authorised Deductions to be made in calculating the amount of Member's benefit will be the sum of the following amounts:

(c) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall by law or pursuant to any collective contract or to any award, judgement or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression "collective contract" shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;.

[4] Of reg. 8, it is necessary to look only at sub-clause (1):

8(1) When a Member leaves Company Service:

(a) on or after reaching age 55, or

(b) because of chronic disability,

he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 and, subject to the provisions of Regulation 9 hereof (if applicable), payment shall be made to him as soon as possible and in any event within 3 months after cessation of Company Service.

[5] The plaintiffs' essential grievance was expressed in paras. 22 and 23 of their amended statement of claim. There they averred that when they severally received their RBF entitlement from the first or second defendant company they discovered that from their entitlement there had been made deductions, which they listed as four items, of their employers' contributions to the EPF and the PF and of the interest or dividends declared on those contributions. They contended that the deductions, which will be referred to simply as the "EPF deductions" and "PF deductions", were in contravention of law, "particularly" the EPF Acts of 1951 and 1991. The provisions of the EPF Acts that they said were contravened are, as they said in para. 24 of their amended statement of claim, s. 9(1) of the 1951 Act and s. 47(1) of the 1991 Act.

[6] It is convenient at this point to set out those sections. Section 9(1) of the 1951 Act said:

> 9(1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages or remuneration of, or otherwise to recover from, the employee the employer's contribution.

Section 47(1) of the 1991 Act says:

> 47(1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee.

[7] In para. 35 of their amended statement of claim the plaintiffs prayed for several reliefs. Subparagraphs (1) and (2) were for declarations that "reg. 5(2) read with reg. 7(1)(c) … contravenes" those sections. Subparagraph (3) was for a declaration that the alleged EPF deductions were illegal. Obviously the alleged illegality hinged on the alleged contravention of those sections of the EPF Acts. Subparagraph (4) was for a declaration that the alleged PF deductions were illegal. Unlike it was in the case of the EPF deductions, the basis for the allegation of illegality of the alleged PF deductions was not the subject of any declaration that was sought. It was merely averred generally in paras. 28 and 29, where the plaintiffs asserted that the alleged deductions were done "without any authority in law" and that "the … Trust Deed and Regulations of the PF itself do not authorize the … deductions". As far as can be seen, there has been no submission in this appeal on the averments in paras. 28 and 29. Subparagraphs (5) to (8) of para. 35 were essentially for an order of restitution of the sums allegedly deducted and for ancillary orders to give effect to the order for restitution. Subparagraph (9) was for a declaration that the first and second defendant companies had unjustly enriched themselves by the alleged wrongful deductions. Subparagraph (10) was for a declaration that the Trustee defendants were in breach of trust in failing to make restitution of the alleged deductions to the plaintiffs. Subparagraph (11) was for an order for damages for the alleged breach of trust.

[8] The defendants denied the alleged deductions. Their case was, as may be understood from paras. 20 and 22 of the statement of defence of the trustee defendants, that by virtue of reg. 5(2) the benefit due to a member from the RBF was a lump sum sufficient to bring the aggregate of the EPF and PF

contributions and the interest on them up to the appropriate level specified in reg. 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of that lump sum did not involve any deduction whatsoever. The defendants' case therefore did not involve reg. 7(1)(c) at all.

[9] The defendants applied under O. 14A of the Rules of the High Court 1980 for the determination by the High Court of four questions. By consent the application was granted with the addition of eight questions brought up by the plaintiffs. There were therefore twelve questions. Question No. 1, which was the defendants' question, was as follows:

> 1. Upon a construction of the Regulations of the Shell Sarawak and Sabah Retirement Fund as to whether the benefit payable to a member is either;
>
> (a) the sum equal to what is specified as the 'level of benefit applicable' as mentioned in Regulation 5(3)(a); or
>
> (b) is a lump sum which is sufficient to bring the aggregate of the contributions (as hereinafter defined) up to the level of benefits specified in Regulation 5(3)(a).
>
> (The term 'contributions' is defined to mean the contributions made by the Employing Company to the Employees Provident Fund, the Shell Sarawak and Sabah Provident Fund and other specified Funds and the interest thereon.)

Paragraph (b) of the question reflected the defendants' case. Paragraph (a) reflected what the defendants conceived the plaintiffs' case to be and what was in fact the plaintiffs' case. The learned judge (Judicial Commissioner), decided on para. (a) as the answer. The next three questions, also the defendants' questions, were on the basis that para. (b) was the answer to question No. 1. The questions were whether the para. (b) calculation was in breach of the EPF Acts (question No. 2), and whether the employer companies, by paying the RBF benefits according to the para. (b) calculation, had unjustly enriched themselves (question No. 3) or had acted in breach of trust (question No. 4).

[10] The rest of the questions were the plaintiffs'. Question No. 5 was whether the making of the alleged EPF deductions was in contravention of the EPF Acts. Question No. 6 was whether "reg. 5(2) read with reg. 7(1)(c)", which the question said "purports to

A authorize deductions of the employers' contributions to the EPF", was *ultra vires* the EPF Acts. The learned judge answered questions Nos. 5 and 6 in the affirmative. Question No. 7 need not be stated because the learned judge declined to answer it on the ground that it was framed too broadly, and nothing has B turned on it in this appeal. Question No. 8 was whether, "pursuant to" the two EPF sections, an employer was entitled to deduct, in any manner howsoever described, from the wages or remuneration of the employee, the employer's EPF contributions and the dividends declared on them. The learned judge answered C that an employer was not so entitled. Question No. 9 was whether the first and second defendant companies could "in law" deduct the employers' contributions to the PF and the interest on them from the plaintiffs' RBF entitlement. The judge answered that they could not. Question No. 10 was about unjust D enrichment. The judge answered that there was no unjust enrichment. Question No. 11 was whether the plaintiffs were entitled to a full reimbursement and restitution of their total RBF and PF entitlements. The learned judge answered that they were. Question No. 12 was about breach of trust. The learned judge's E answer was that there was no breach of trust.

[11] The learned judge therefore granted the prayers in subparagraphs (1) to (8) of para. 35 of the amended statement of claim. From that arose the defendants' appeal No. 1075. The F learned judge refused the prayers in subparagraphs (9) to (11) about unjust enrichment and breach of trust. From that arose the plaintiffs' appeal No. 1177.

[12] Having considered the regulations in question and the G arguments of both sides, we will state our understanding of the regulations. It is clear from the aforesaid paragraphs of the statement of defence and the defendants' questions Nos. 1 to 4, that, as far as concerned what they saw the deductions that the plaintiffs were aggrieved about to be, they had acted in H accordance with and within the confines of reg. 5, especially sub-clause (2) thereof up to, but not including, its last sentence, which leads to reg. 7, so that that last sentence and reg. 7 did not enter into what they did.

[13] Sub-clause (3) of regulation 5 concerns the "level of benefit I applicable to a Member". The level of benefit will differ from member to member. It depends on his years of service, earnings,

and other factors. Sub-clause (3) sets out the various formulas to be used in arriving at the level of benefit in the particular circumstances of a member. Take a case that falls under the simple formula "2.25 x Relevant Earnings x years of Accredited Service". If the relevant earnings were RM9,000 and the years of service were 33, the level of benefit applicable to the member concerned would be RM668,250.

[14] There are set out in sub-clause (2) of reg. 5, in paras. (a) and (b), certain benefits that have already accrued or been paid to a member. The accrued benefits are under para. (a). These are employers' contributions to two funds, the "Local Provident Fund", that is the PF (subpara. (i)), and the "State Fund", that is the EPF (subpara. (ii)), and interest on such contributions. There are no funds under subpara. (iii). The benefits that have been paid are under para. (b). These have hardly featured in this case. The controversy in this case has centred on employers' contributions in the EPF and the PF, especially the EPF. For the sake of convenience and for want of a better term, the benefits under paras (a) and (b) will be referred to as "accrued benefits".

[15] Now sub-cl. (2) says that the benefit due from the RBF "shall be a lump sum", but not any lump sum. It is a lump sum – and these words are of critical importance – "sufficient to bring the aggregate of (the accrued benefits) up to the level of benefit specified in sub-cl. (3) hereof". Take the example just now of a member whose level of benefit is RM668,250 and assume that his accrued benefits consist only of employer's contributions in the EPF amounting to RM200,000. The lump sum that will be sufficient to bring the aggregate of the accrued benefits (RM200,000) up to the level of benefit of RM668,250 will be RM468,250. That is the lump sum that constitutes the benefit due to the member from the RBF. If he happens to be also a member of the PF – and there are only 57 in this case – and his employer's contributions in the PF amount to RM10,000, the accrued benefits will increase in total to RM210,000, and the lump sum sufficient to bring the aggregate of the accrued benefits (RM210,00) up to the level of benefit of RM668,250 will be RM458,250. That is the lump sum that constitutes the benefit due to the member from the RBF. If he has received benefits that fall under para. (b), the aggregate of the accrued benefits will increase further and the lump sum that constitutes the benefit due to him from the RBF will decrease accordingly.

[16] It is obvious, therefore, that the aim of the employers in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF – that is the accrued benefits – do not come up to that amount, then the RBF will come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF. Or if the accrued benefits are more than the level of benefit, as happened in the case of a few plaintiffs, the target has been exceeded, and nothing is due from the RBF. The member will be enjoying, or will have enjoyed, a greater amount of retirement benefits than the target set by the RBF. It is not true, as submitted by Dato' Dr. Cyrus Das on behalf of the plaintiffs, that in such cases the member will be indebted to the RBF for the excess. Such being the nature of the RBF, there will be no basis on which to make the member become indebted to the RBF for the excess. The member will not have received anything from the RBF.

[17] It is elementary that, arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-cl. (3), all that needs to be done is to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum. That is what was done in the calculations of the RBF entitlement of members that have been exhibited in this case. The summary of each calculation begins with the "Opening Balance", which is the level of benefit. The deductions come after the word "Less". In all cases there are the EPF deductions. In a few cases there are also the PF deductions. These deductions are respectively described as "Company Contribution on EPF" and "Company Contribution on SSSPF". But the deductions are only an arithmetical or accounting way of arriving at the sufficient lump sum. They are not deductions by taking away from the member. The member is not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF is to ensure that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit.

[18] Dato' Cyrus cited various instances in which he said the defendants admitted making deductions of employers' EPF and PF contributions and instances in which he said that the defendants contradicted themselves by denying making deductions of those contributions. We have examined those instances and we find that where the defendants admitted making deductions they meant deductions in the arithmetical or accounting sense that has been explained, that is deductions for the purpose of determining the lump sum to which the plaintiffs were entitled from the RBF and not deductions from what they were entitled to from the RBF, but where they denied making deductions they meant deprivative deductions in the sense alleged by the plaintiffs, which we will come to in a while.

[19] In our judgment, therefore, the defendants were right in their defence in paras. 20 and 22 of the trustees' statement of defence that has been set out earlier. They were right in their stand that in arriving at the lump sum they acted within reg. 5(2) and that, as far as concerned the plaintiffs' grievance as to deductions made, the manner in which they arrived at the lump sum did not involve reg. 7.

[20] The last sentence of sub-cl. (2) of reg. 5 says: "In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7", which sets out the deductions that are to be made, not in calculating the lump sum constituting the benefit due from the RBF, but "in calculating the amount of a Member's benefit". These words echo the words in reg. 5(1): "the benefit due from this fund shall be calculated in accordance with the following provisions of this regulation and the net amount thereof shall be settled in accordance with reg. 8", sub-cl. (1) of which says: "When a Member leaves Company Service … he shall be entitled to be paid the net amount of his benefit calculated in accordance with reg. 5 …". The term "net amount" in regs. 5(1) and 8(1) has been the subject of a bit of submission by Dato' Cyrus. It simply means that while the benefit due to a member from the RBF is the sufficient lump sum specified in sub-cl. (2) of reg. 5, what is actually to be paid to him is the net amount after making the deductions authorized by reg. 7, if any. If no deduction falls to be made under that regulation, the net amount is the full lump sum. Of course, in this case, if there had been any deduction to be made under reg. 7 it would have been made – although we do not recall that in any of the exhibited calculations

any amount, besides the EPF and PF amounts that needed to be subtracted to arrive at the sufficient lump sum, was pointed out to us as being a deduction under reg. 7 – but such a deduction would not have been the subject of the plaintiffs' grievance.

[21] The learned judge's understanding of what the lump sum is, is expressed in the following words at p. 59 of his judgment:

> A plain reading of the Regulation 5(2) clearly shows that the entitlement is a lump sum. This lump sum is an aggregate of the sum in paragraph *(sic)* of (a) and (b) of Regulation 5(2). The determinative factor for the amount of the lump sum is the formula in Regulation 5(3) for the computation of the level of benefit and entitlement. If for a moment we ignore the amount to be deducted under Regulation 7, it would be obvious that the lump sum under Regulation 5(2) would be equal to the amount computed under Regulation 5(3). If not for the deduction under Regulation 7, this lump sum would be payable to the plaintiffs. However if the deductions under Regulation 7 is *(sic)* taken into account the lump sum payable is less the amount deducted. It is this deduction that is being challenged, particularly the deductions under Regulation 7(1)(c). This is one of the reasons that I cannot accept the defendants' submissions that the lump sum is a top up to the retirement benefits payable to the plaintiffs by way of EPF contributions.

[22] One thing to be observed in that passage is the judge's view that the aggregate of the amounts in paras. (a) and (b) of reg. 5(2) – the "accrued benefits" – is the lump sum and that it "would be equal to the amount computed under reg. 5(3)", that is the level of benefit. This view is reflected in the formula that the judge produced at p. 33 of the judgment. The aggregate of the accrued benefits cannot as a rule be equal to the level of benefit. It could be so only in a rare case and only if, by a fluke or a miracle, the aggregate of accrued benefits and the level of benefit, when they came to be computed, happened to be two amounts that were exactly equal. Dato' Cyrus, while endeavouring to support the judge, improved on that view of the judge's by saying in oral submission that it would have been better if a third figure were added to the formula, the third figure being the top-up. That would be a perfectly correct arithmetical statement in cases , as are all the cases in this case but a few, where the accrued benefits were less than the level of benefit. In such cases, since the top-up would be the sum sufficient to bring the

aggregate of the accrued benefits up to the level of benefit, of course, arithmetically, the aggregate of the accrued benefits plus the top-up must equal the level of benefit.

[23] But the serious error in this case is the judge's view, as may be inferred from the passage quoted just now and better seen in the judge's said formula, and Dato' Cyrus's contention, as expressed in his oral submission, and the belief that the plaintiffs held or were led to hold, that the lump sum that constitutes the benefit due from the RBF is the level of benefit. The judge's formula, with a commonly accepted amendment, is that the net benefit due from the RBF is (A + B = C) – D, where A and B are the amounts under reg. 5(2) – the "accrued benefits" – C is the level of benefit, and D is an authorized deduction or deductions under reg. 7. In his oral submission Dato' Cyrus said, as recorded: "Our submission is that the lump sum is (a + b) plus the 3rd sum if necessary to bring (a + b) to level of benefit. The lump sum is the aggregate sum of (a) + (b) + top-up and not just the top-up". Since, as has been seen, that aggregate must, of arithmetical necessity, be equal to the level of benefit, the submission amounted to an assertion that the lump sum must be the level of benefit. That is patently wrong. The error arose from a failure or refusal to appreciate or recognize the true significance of the critical words "sufficient to bring the aggregate of (the accrued benefits) up to the level of benefit specified in sub-cl. (3)" that qualify or describe what the lump sum is that constitutes the benefit due to a member from the fund.

[24] It was because they held the notion that the RBF benefit that they were entitled to was the level of benefit, which was a wrong notion, that the plaintiffs became aggrieved when they discovered upon receiving their RBF benefit that the trustees had deducted the accrued benefits, particularly the EPF contributions, from their respective levels of benefit. They would not recognize that the deduction was made in the arithmetical implementation of sub-cl. (2) of reg. 5 in order to arrive at the sufficient lump sum, because that would be the legal answer to their grievance that would make it legally baseless. Instead they turned to para. (c) of reg. 7(1) and contended that the deduction was made under that paragraph. From that paragraph their counsel, in this appeal, chose the words "any payments which a company shall by law … have been required to make to the Member … by way of

A additional remuneration or benefit beyond his ordinary remuneration" and argued that the employer's EPF contributions fitted into those words and then, turning to the two sections of the EPF Acts, further argued that the amount of the level of benefit which the plaintiffs contended was the benefit due to them
B under the RBF was "wages or remuneration" and that therefore the employer's EPF contributions had been deducted or recovered from their wages or remuneration in contravention of the two sections. Mr. Robert Ham QC for the defendants countered those arguments on para. (c) of reg. 7(1) and the two EPF sections
C with several tiers of argument, so that in appeal No. 1075 something like half of the argument was devoted to these matters.

[25] In this case there was only one instance of "deduction" of the EPF and PF benefits and that was, as we said, an arithmetical
D or accounting deduction to arrive at the sufficient lump sum, and not a deprivative deduction. There has not been another instance of deduction of those benefits, to be seen as a reg. 7(1)(c) deduction. Since the plaintiffs would not have been driven to construe that regulation in the way that has been done in this
E appeal and in the High Court had they not held the notion that the lump sum was the level of benefit, and since that notion is patently wrong, the defendants' appeal No. 1075 has to be allowed without the necessity of entering upon a deliberation of the arguments concerning reg. 7(1)(c) and the two EPF sections
F and making a reasoned finding as to the correctness of the High Court's declarations concerning that regulation. It would be a purely academic exercise, and one of a very involved nature, that is not required to be carried out in order to dispose of appeal No. 1075. Those declarations were sought solely to entitle the
G plaintiffs to a restitution of the alleged deductions. There had been no deductions under or by virtue of para. (c) of reg. 7(1) and the plaintiffs were not entitled to any restitution or, in other words, to succeed in their action. To order restitution, as the High Court did, would be to compensate them for what they had not lost but
H were always available for their enjoyment and benefit.

[26] We will, nevertheless, say a few words generally about para. (c) of reg. 7(1). That paragraph of course does not mention employer's EPF contributions. It was only by resorting to the
I argumentative faculties and calling in aid various authorities that the plaintiffs sought to establish that "any payments which a

company shall by law … have been required to make to the member … by way of additional remuneration or benefit beyond his ordinary remuneration" would or could cover employer's EPF contributions. It is an irresistible reflection that if, before they became aware of the manner in which their RBF entitlement was computed, a suggestion had been made that the employer's EPF contributions might be deducted from their RBF entitlement by virtue of para. (c) of reg. 7(1) because the words in question were capable of referring to the employer's EPF contributions, the plaintiffs would have come out strongly against such a construal of the words. It could not have been the intention of the Member Companies who established the RBF and the regulations to deduct employer's EPF contributions from the sufficient lump sum that constitutes the benefit payable under the RBF and to resort to para. (c) of reg. 7(1) to enable that to be done, and therefore it could not have been their intention that the paragraph be subtly framed using the words in question to achieve that purpose, because to deduct employer's EPF contributions from the lump sum would not only expose them to accusations of illegal action and fraud on employees but would result in no employee getting any benefit from the RBF and in the RBF becoming a futile exercise, and it is inconceivable that those companies would embark on such an absurd, pointless and perilous undertaking.

[27] We therefore allow the defendants' appeal No. 1075 with costs and set aside the orders made by the High Court in favour of the plaintiffs. We also order that the deposit be refunded to the defendants. Since the defendants succeed completely in appeal No. 1075, it is not necessary to answer the question whether, even if the defendants should fail in their appeal on the O. 14A questions, the restitutionary orders ought nevertheless to be set aside or suspended pending the trial of the issue of limitation. The question arose because the defendants had in their statements of defence raised the defence of limitation which in the appeal the defendants contended had still to be tried, notwithstanding that the O. 14A questions had been answered in the High Court in favour of the plaintiffs, before the judge could finally decide the action and grant the reliefs sought.

[28] Appeal No. 1177 is the plaintiffs' appeal against the High Court's refusal of the prayers concerning unjust enrichment and breach of trust. Since those prayers were sought on the premise that there had been wrongful deductions from the plaintiffs' RBF entitlement, and since in our judgment there were no such deductions, we dismiss appeal No. 1177 with costs and order that the deposit be paid to the defendants to account of taxed costs.